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Model Retail Instalment Sales Act

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MODEL RETAIL INSTALMENT SALES ACT

"Consumers, by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision. Two-thirds of all spending in the economy is by consumers. But they are the only important group in the economy who are not effectively organized, whose views are often not heard."

President Kennedy in his March 15, 1962 message to Congress requesting legislation to protect consumers. (*N. Y. Times*, March 16, 1962, p. 16 (city ed.))

GENERAL COMMENT

A significant part of the phenomenal growth experienced by the American economy during the last four or five decades can be traced to the equally phenomenal growth of the instalment sale device. It would be interesting to speculate what percentage of the over seven million automobiles produced by Detroit in 1955 would have been sold had buying on time been prohibited by government fiat in 1954. Although instalment buying is indispensable to the continued vitality of the economy, much criticism has been directed as of late to the ineffective regulation of abuses in this area.

In his widely-reported March fifteenth message to Congress requesting consumer oriented legislation, President Kennedy recognized the need of consumers to be protected "against charges of interest rates and fees far higher than apparent without any real knowledge on the part of the borrowers of the true amounts they are being charged." The President strongly urged that federal legislation was both desirable and necessary:

Excessive and untimely use of credit arising out of ignorance of its true cost is harmful both to the stability of the economy and to the welfare of the public. Legislation should therefore be enacted requiring lenders and vendors to disclose to borrowers in advance the actual amounts and rates they will be paying for credit.

The President stressed, however, that the thrust of any federal legislation would be directed at the disclosure of, rather than the setting of, finance charges. This would mean that existing state legislation setting interest rates and regulating instalment sales in general would remain unaffected.

Thus, assuming the enactment of federal legislation requiring full and complete disclosure of interest rates, the "informed" consumer will still make improvident purchases and be at the mercy of unscrupulous sellers. The "informed" instalment buyer who defaults is inadequately protected by most state retail instalment sales laws.

The following Model Act attempts to provide the instalment buyer with more information than he has been receiving and also to mitigate some of the consequences resulting when his improvidence overtakes him. No economic or ethical justification for this Model Act will be attempted other than to restate the axiom that predatory practices are economically indefensible.

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SECTION 1. GENERAL DEFINITIONS

Subject to additional definitions contained in the subsequent sections of this Act which are applicable to specific sections, and unless the context otherwise requires, the following words and terms shall have the following meanings in this Act:

(a) "Cash Sale Price" means the amount in dollars for which the instalment seller has sold or agreed to sell goods or services or both to the instalment buyer.

(b) "Finance Charge" means the amount in dollars the instalment buyer agrees to pay to the instalment seller or holder for the privilege of purchasing goods or services or both under a retail instalment sales agreement.

(c) "Goods" mean any chattel personal, including motor vehicles, purchased primarily for personal, family, or household purposes or purchased for commercial use by a small business buyer. "Goods" shall not include money or things in action.

(d) "Holder" means a person entitled to enforce a retail instalment sales agreement against an instalment buyer.

(e) "Instalment Buyer" means a person who purchases goods or services or both under a retail instalment sales agreement or one succeeding to the rights or assuming the obligations of such person.

(f) "Instalment Sales Price" means the sum, expressed in a dollar amount, of the cash price, the finance charge, and any insurance premiums and official fees the instalment buyer agrees to pay under the terms of the retail instalment sales agreement.

(g) "Instalment Seller" means a person who sells or agrees to sell goods or services or both pursuant to a retail instalment sales agreement.

(h) "Motor Vehicles" include passenger cars, trucks, buses, station wagons, motor scooters, motorcycles, and motorized farm equipment.

(i) "Person" includes an individual or an organization.

(j) "Retail Instalment Sales Agreement" means any contract entered into in this state for the retail sale of goods or services or both under which the instalment sale price is payable in more than one payment subsequent to the making of the contract.

(k) "Revolving Account" means a retail instalment sales agreement where an instalment seller extends credit to an instalment buyer upon which and up to a specified amount the instalment buyer may purchase

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goods whereby the specified amount of credit extended is decreased by each purchase and is increased by each payment up to the original or another specified amount.

(l) "Services" means any labor furnished or agreed to be furnished in the delivery, installation, repair, or improvement of goods or chattels or both or alterations or improvements upon or in connection with real property, such labor being purchased primarily for personal, family, or household purposes or purchased for commercial use by a small business buyer.

(m) "Small Business Buyer" means an instalment buyer of goods or services or both whose net income from his business or profession has averaged \$5000 or less over the previous three years as evidenced by Schedule "C" of Federal Income Tax Form 1040.

(n) "Writing" includes printing, typewriting, or any other intentional reduction of language to tangible form.

(o) A person "notifies" another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other person actually comes to know of it.

COMMENT

The definitions contained in this section in effect determine the scope of this Act. Thus, instalment sales of realty, i.e., the purchase of single- and multiple-unit dwellings, commercial buildings, parcels of realty, etc., are not regulated by this Act. It is felt that this type of transaction deserves separate statutory treatment due to the many accommodations that would have to be made with existing federal and state legislation.

The "cash sale price" is simply the selling price to the instalment buyer. To define this term as the "retail price" might result in a loophole in the Act where the instalment seller sells to the particular instalment buyer at the "wholesale," "list" price, etc. The "finance charge" is the dollar amount of interest the instalment buyer is charged for purchasing on time.

The "goods" (with exception of those purchased for commercial use by a "small business buyer") within the ambit of this Act are those which are commonly termed "consumer goods." The functional test utilized by UCC section 9-109(1) as to what are consumer goods is adopted. "Goods" specifically include motor vehicles and in this respect this Act departs from the separate statutory treatment afforded motor vehicles by most instalment sales acts. The only justification for separate statutory treatment would seem to be the unexplained policy that different interest rates should apply where there is a motor vehicle instalment sale. Dollar limits on qualifying goods are also dispensed with. There seems to be no compelling reason why the instalment buyer of a cabin cruiser should not be entitled to the same protection the instalment buyer of an outboard motor receives. The regulation of large and small loans unrelated to an instalment sale is left to existing separate state legislation.

"Holder" includes the instalment seller except where the context otherwise requires. The definition of "instalment buyer" reflects the present statutory treatment of that term. "Instalment sale price" simply means the total amount the instalment buyer is obligated to pay under the terms of the contract. "Instalment seller" requires no comment.

"Motor vehicles" as defined attempts to list as far as possible, but without being all-inclusive, what is generic to that term in view of the many contemporary forms of motorized land transportation. "Person" includes an organization or, as the draftsmen's comment to UCC section 1-201(28) explains, "every type of entity or association excluding an individual acting as such."

The definition of "retail instalment sales agreement," which by direction is definitive of retail instalment sales subject to this Act, departs from existing law by including the unsecured transaction. The unsecured instalment sale is subject to abuses prohibited by Sections 2 and 3, among others, in this Act. The term "revolving account" is merely a designation of those transactions which take different names in many jurisdictions. This term should be construed to include those instalment sale devices which resemble but are not identical to the type of transaction defined such as the "merchandise certificate" regulated by section 402A of the New York Retail Installment Sales Act.

The definition of "services" presents no problem until one is confronted with the situation where services are performed in connection with realty and a mortgage is placed on the realty to secure payment for the services. This is not the typical transaction involving the instalment sale of realty mentioned in the preface to this Comment. The remodeling of a family house, the installation of a furnace, and the landscaping of a lawn are some examples which are of themselves arguably "typical." Such "services in connection with realty" are within the scope of this Act and state law conflicting with provisions of this Act should be superseded. Conflicting federal law, however, should prevail.

The "small business buyer" who purchases on time for commercial purposes should be given the same protection as the luxury cabin cruiser devotee. The student earning his tuition by driving his own taxi, the small independent contractor, the corner grocer, are, to name a few, usually unprovided for in retail instalment sales acts. Instead of placing a dollar limit on the amount of commercial purchases one buys on time as the qualifying factor, a "net profits" test was adopted for two reasons. "Net profits" as set out not only provides a ready reference but also takes care of the common situation where an independent contractor makes many thousands of dollars of instalment commercial purchases but has little earnings.

UCC sections 1-201(26) and (46) are relied on with minor changes for the definitions of "notifies" and "writing."

SECTION 2. FORM OF THE RETAIL INSTALMENT SALES AGREEMENT

(a) Every retail instalment sales agreement shall consist of a single writing signed by the instalment seller and the instalment buyer. The printed terms of the agreement shall be set in ten point standard type. The printed or written terms shall appear on only one side of each page. The agreement shall not be more than three pages in length and the surface of each page shall not be more than 120 square inches in area.

(b) Every retail instalment sales agreement shall include the date when signed, the names and addresses of the instalment seller and the instalment buyer, a description of the goods or services purchased, a description of collateral securing the instalment buyer's obligations under the agreement, if any, and, at the top of the first page of the agreement in eighteen point extrabold type, the words "Retail Instalment Sales Agreement—The Terms of this Agreement are Regulated by State Law."

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(c) There shall be included on the first page of every retail instalment sales agreement in the following order the dollar amounts of the following items, such items to be so designated:

- (1) The cash sale price of the goods or services or both.
- (2) The instalment buyer's downpayment in money or goods or both with a description of and the value assigned to the goods by the instalment seller as downpayment.
- (3) Any sale, excise, or other taxes not included in the cash sale price.
- (4) The charge to the instalment buyer for insurance, if any, with a specification of the coverage and benefits in simple terms. If the goods purchased by the instalment buyer consist of a motor vehicle or vehicles the description of the coverage, if any, shall include in twelve point bold type a statement that the insurance includes or does not include coverage for liability for personal injury or property damage or both caused to others and for property damage caused to the motor vehicle sold as the case may be.
- (5) The charge to the instalment buyer for official fees including registration and filing fees.
- (6) The finance charge.
- (7) The instalment sale price.
- (8) The true annual interest rate, as defined and computed in Section 4, charged to the instalment buyer.

(d) The retail instalment sales agreement shall include immediately above the place for the signatures of the instalment seller and the instalment buyer, the following notice to the instalment buyer printed in twelve point bold type:

NOTICE TO BUYER

- (1) Do not sign this agreement if it contains any blank spaces.
- (2) You have a statutory right to a signed copy of this agreement at the time of signing.
- (3) You have a statutory right at any time to pay in advance the unpaid balance due under this agreement and in so doing you will receive a partial rebate of the finance and insurance charges.
- (4) You have a statutory right to redeem goods purchased under this agreement when they have been repossessed because of your default and this right to redeem after repossession does not terminate until sixty days after repossession unless the reposessor has disposed of the goods before that time.
- (5) The seller has no right to unlawfully enter your premises or commit any breach of peace to repossess goods purchased under this agreement.
- (6) You have the right to cancel this agreement by notifying the seller within forty-eight hours after signing, if, but only if,

you have not received before cancelling, a substantial part of the goods or services purchased under this agreement within that forty-eight hour period. If these conditions are met and if you avail yourself of this right to cancel, you are entitled to a refund within ten days, after you so notify the seller of your desire to cancel, of ninety percent of any deposit you have made.

(e) Any violation of this Section shall subject the instalment seller to a penalty to the instalment buyer of an amount equal to the first instalment payment.

COMMENT

Broadly stated, the purpose of this Section is to achieve more equality of bargaining power between the instalment seller and the instalment buyer. The average uninformed instalment buyer rarely has an understanding of the terms of the contract he is entering into, a realization of the true cost of the interest he is paying, or an appreciation of his legal rights. Such uninformed bargaining power is bargaining impotence.

The rationale of subsection (a) is that few buyers read the instalment sale contract they sign. The usual instalment sale contract contains a mass of small print setting out irrelevant terms and conditions on far too many pages with the result that if the instalment buyer suppresses the urge to sign immediately "on the dotted line" he will rarely understand what he reads. The provisions of subsection (a) are designed, metaphorically speaking, to lead the buyer to water. An express requirement that the instalment buyer read the contract and attest to that fact would, however, be senseless. While one cannot be certain the buyer will drink the water after he has been led to it, there should be some assurance the water is not muddled.

Subsection (b) includes provisions normally found in retail instalment sales acts. The instalment seller's address would be that of his business and the instalment buyer's address would usually mean his home address unless he were a "small business buyer" and had a separate business establishment.

Subsections (c) and (d) are explained in other comments to this Act. The requirement that the insurance coverage be described in "simple" terms means just that. The technical description contained in the usual policy would not be sufficient. Any explanation of coverage should be phrased in language the meaning of which the average buyer could easily understand. The federal excise tax and certain state sales and use taxes must by statute be separately stated and subsection (c)(2) provides for this contingency.

SECTION 3. PROHIBITED TERMS IN THE RETAIL INSTALMENT SALES AGREEMENT

(a) There shall be no blank spaces in the retail instalment sales agreement or note executed in connection with a retail instalment sales agreement when the agreement or note is presented to the instalment buyer for his signature. No retail instalment sales agreement or note executed in connection with a retail instalment sales agreement shall contain among its terms the following:

(1) A confession of judgment (or its equivalent) by the instalment buyer upon his default.

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(2) A grant of authority to the holder to unlawfully enter the instalment buyer's premises or commit any breach of peace in the repossession of the collateral, if any.

(3) A waiver of right of action against the holder by the instalment buyer for illegality in repossession.

(4) A waiver of any rights or remedies by the instalment buyer which he may have against the holder.

(5) A provision allowing the holder to repossess the collateral, if any, for default in payments other than as provided in Section 12(a).

(6) A provision allowing the holder to repossess for non-substantial defaults.

(7) A provision allowing the holder to accelerate payments before repossession.

(8) An assignment of any part of the instalment buyer's wages.

(9) A provision limiting, modifying, or excluding an express or implied warranty made by the instalment seller in connection with the sale or a provision so integrating the retail instalment sales agreement so as to limit, modify, or exclude such a warranty.

(b) Any violation of this Section shall subject the instalment seller to a penalty to the instalment buyer of an amount equal to the first instalment payment.

COMMENT

Because of the possibility of abuse, no exception is made to the provision that blank spaces are prohibited in the retail instalment sales agreement or note when signed. If an instalment buyer contracts to buy an automobile and it is to be factory delivered, a description of the automobile as required by Section 2 of this Act need not include an undetermined serial number.

The various subsections are included to prevent even the insertion of *in terrorem* terms into the agreement. Such terms have no place in a retail instalment sales agreement. Subsection (9) restricts by implication the integration effect of the required "single writing" of Section 2(a) as to warranties made by the instalment seller.

SECTION 4. FINANCE CHARGE

(a) Except as provided in Section 9, a finance charge an instalment buyer agrees to pay for goods or services or both purchased under a retail instalment sales agreement shall be the exclusive finance charge to the instalment buyer for such a purchase under such an agreement.

(b) The finance charge for goods or services or both purchased under a retail instalment sales agreement shall not exceed a true annual interest rate of ____%. The true annual interest rate, which shall always be expressed by percent, shall be computed by the following formula:

$$R = \frac{2PC}{A(N + 1)}$$

- R = the true annual interest rate.
 P = the number of payment periods in one year exclusive of the downpayment. (Always 12 if monthly payments are made, 4 if quarterly payments, and 52 if weekly payments.)
 C = the finance charge.
 A = the amount borrowed.
 N = the number of installment payments in the whole contract period exclusive of the downpayment.

(c) Any violation of this Section shall subject the instalment seller to a penalty to the instalment buyer of an amount equal to the first instalment payment.

COMMENT

This Section deviates from existing law by providing a uniform interest rate for the instalment purchase of new and used motor vehicles as well as other consumer goods. The particular rate adopted by a state will necessarily have to be set higher than those contained in present regulatory statutes but this higher rate more accurately reflects the true interest the instalment buyer pays.

The following example demonstrates the application of the true annual interest formula to a typical instalment transaction. Assume consumer purchases an automobile for \$2000. His down payment is \$500. The dealer computes the finance charge at \$150. Consumer agrees to pay the sum owed in 24 equal monthly instalments.

- P = 12 (the number of payment periods in one year).
 C = \$150 (the finance charge).
 A = \$1500 (the amount borrowed assuming no other charges such as insurance fees, etc.).
 N = 24 (the number of instalment periods).

$$R = \frac{2 \times 12 \times \$150}{\$1500 \times 25} = 9.6\%.$$

SECTION 5. COPY TO BUYER

(a) The instalment seller shall give at the time of signing a copy, signed by both him and the instalment buyer, of the retail instalment sales agreement to the instalment buyer who shall acknowledge at such time its receipt in handwriting on both his and the instalment seller's copy.

(b) A violation of this Section shall subject the instalment seller to a penalty to the instalment buyer of an amount equal to the first instalment payment.

COMMENT

This Section has its counterpart in nearly all retail instalment sales acts although the requirement that the instalment buyer attest to the fact of receipt on his and the instalment seller's copy is unique and should simplify evidentiary problems. This Section presupposes that memories are short and provides the instalment buyer with a ready reference to his rights and obligations under the agreement.

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SECTION 6. PAYMENTS AND PREPAYMENTS

(a) Where there is an assignment of the retail instalment sales agreement or a note given by the instalment buyer to secure his obligations under the agreement, until the instalment buyer is notified in writing of such assignment, the payment by him of any instalment to the last known holder of such agreement or note shall discharge the instalment buyer from his obligation on the instalment so paid.

(b) The instalment buyer shall receive, without request, a receipt for each instalment paid. Where the instalment buyer has completed his instalment payments, the holder shall give, without request, to the instalment buyer, a signed cancellation of the instalment buyer's obligations under the retail instalment sales agreement and shall take those steps necessary to release the security interest in any collateral.

(c) The dollar amount of any single instalment shall not exceed the dollar amount of any other single instalment by more than ten percent.

(d) The instalment buyer shall have the right at any time to prepay the entire unpaid balance due under the retail instalment sales agreement. If the instalment buyer so prepays he shall be tendered without request a partial refund of the finance charge such refund to be computed in the following manner. The finance charge shall be divided by the number of instalments originally provided for, which figure shall then be multiplied by the number of instalments by which payment has been anticipated by the instalment buyer and the result so obtained shall be the amount of the refund to which the instalment buyer shall be entitled. Upon prepayment the instalment buyer shall also be tendered without request a refund of insurance charges allocable, as far as possible, to the amount prepaid, by reference to the insurer's refund tables.

(e) A violation of subsections (b), (c), and (d) of this Section shall subject the holder to a penalty to the instalment buyer of an amount equal to the first instalment payment.

COMMENT

While subsection (a) in general reflects existing law in this area, subsection (b) contains some rather novel provisions. Under subsection (b), the instalment buyer is entitled to a receipt for an instalment paid *without* request. Also, there is an express provision requiring the holder to release a security interest held in any collateral.

Subsection (c) in effect prohibits "balloon payments." The undesirable consequences resulting from the balloon payment device more than offsets any apparent advantage to the instalment buyer. If an instalment buyer supposedly can pay most of the cash sale price in a few instalments, with proper timing he should be able to tender a large downpayment and accordingly reduce the amount of each instalment. This would be "ballooning" in reverse and the large deficiency judgments resulting from a default in the usual balloon payment plan could be avoided.

Subsection (d) rejects the so-called "Rule of 78" in computing the refund the instalment buyer is allowed when he prepays. This subsection does not require strict allocation of the finance charge to the amount prepaid to be determinative

of the refund amount. Thus, if an instalment buyer prepays in the middle of an instalment period, the finance charge allocable to that whole instalment period may be retained by the holder. No provision is made as to partial prepayment which may be negotiated between the parties.

The last sentence of subsection (d) recognizes that refund of insurance charges are generally paid according to "refund tables" and provision is made for such practice assuming, of course, that the tables used are not unrealistic.

SECTION 7. RIGHT TO CANCEL

The instalment buyer shall have the right to cancel the retail instalment sales agreement for other than the instalment seller's breach where:

(a) the instalment buyer has not received or been tendered a substantial part of the goods or services or both, and

(b) the instalment buyer notifies the instalment seller of his desire to cancel before receipt or tender of a substantial part of the goods or services or both and within forty-eight hours after signing the agreement.

A cancellation by the instalment buyer of the retail instalment sales agreement pursuant to this Section shall entitle him, without request, to a refund by the instalment seller within ten days after such cancellation of at least ninety percent of all deposits, including any downpayment, made under the agreement. The instalment buyer shall incur no additional liability for a cancellation pursuant to this Section.

COMMENT

The purpose of this unique Section is to give the weak-willed instalment buyer, who succumbs to a "sales pitch" at the showroom or front door, an opportunity to reconsider and, if certain conditions are met, to cancel the agreement. This Section in effect gives to the instalment buyer a "remedy" without breach by the seller and in no way impairs any other remedy the buyer may have. The buyer may exercise this "remedy" for good reason or even capriciously. If an instalment buyer capriciously cancels a number of agreements with a particular seller the inference that the buyer is maliciously interfering with the seller's business may be suggested. Such an inference, however, is absurd as a seller would be ill-advised to contract with a buyer who has previously cancelled several agreements under this Section.

Whether an instalment buyer has received or been tendered a "substantial" portion of what he has purchased is a question of fact. Where the instalment buyer purchases a bedroom set, receipt of the bed would usually be "substantial" receipt. The draftsmen express no preference as to what would be an adequate test in determining "substantial" receipt or tender. A test based on the percentage of the cash sale price of what is received over the cash sale price of what is purchased under the agreement may not be appropriate in all situations.

Subsection (b) also includes the possibility where the instalment buyer cancels a few hours after signing and the instalment seller rushes delivery. Such a tactic is expressly precluded.

SECTION 8. COLLATERAL, ADD-ONS, AND AFTER-ACQUIRED COLLATERAL

(a) Where under a retail instalment sales agreement a security interest in collateral is taken to secure performance of the obligations of the instal-

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ment buyer under the agreement, the then fair market value of such collateral shall not exceed the cash sale price of the goods or services or both purchased by the instalment buyer.

(b) Where a security interest in the goods purchased under a retail instalment sales agreement by an instalment buyer is retained by the instalment seller to secure the instalment buyer's obligations under the agreement, no other collateral shall be taken to secure the obligations of the instalment buyer unless the cash sale price of services performed in connection with the goods exceeds one-third of the cash sale price of the goods.

(c) Where an instalment buyer makes a purchase at a different time or an unrelated purchase at the same time from the same instalment seller, each purchase shall be subject to a separate retail instalment sales agreement. The security of each agreement shall secure only the obligations of that agreement and default in one agreement shall not constitute default in the other.

(d) Collateral securing the performance of the obligations of the instalment buyer under a retail instalment sales agreement shall not include the instalment buyer's interest in after-acquired property other than accessions.

(e) Any violation of this Section shall subject the holder to a penalty to the instalment buyer of an amount equal to the first instalment payment.

COMMENT

The provisions of this Section are directed against the not uncommon situation where, for example, the instalment buyer of a television set secures his obligations under the agreement with the living room furniture. This Section does not include within its scope the regulation of "over-security" in the small loan area.

Subsections (a) and (b) are interrelated and must be read as a logical whole. If, under subsection (b), the cash sale price of services performed in connection with the goods exceeds one-third of the cash sale price of the goods, the fair market value of the collateral, if any, securing the payment for the services cannot exceed the cash sale price of the services according to subsection (a). Where the cash sale price of the services is less than the cash sale price of the goods, the seller has two choices, i.e., he can retain a security interest in the goods sold as the only collateral or he can require the buyer to furnish other collateral the fair market value of which does not exceed the cash sale price of the goods and services. The cash sale price rather than the instalment sale price is determinative of the amount of the collateral allowed as there is no reason why the payment of the finance and insurance charges should be secured in view of Section 12 of this Act which requires a refund of finance and insurance charges accruing after repossession.

Subsection (c) specifically prohibits "add-ons" and "disguised" add-ons. Thus, if an instalment buyer purchases from an instalment seller a television set on Monday and a television antenna from the same seller on Tuesday, the instalment seller cannot avoid the operation of this subsection by having the instalment buyer cancel the first contract and combine the two purchases into one agreement. Whether a purchase is "unrelated" is a question of fact.

Subsection (d), unlike UCC section 9-204(4)(b) which allows a ten day

period of grace, completely prohibits after-acquired collateral clauses in a retail instalment sales agreement.

SECTION 9. REFINANCING AND EXTENSIONS

(a) An agreement between the instalment buyer and holder refinancing the payment of amounts unpaid by an instalment buyer under a retail instalment sales agreement shall be subject to the provisions and penalties of this Act. The refinance charge shall not exceed a true annual interest rate, as defined and computed in Section 4, of ____%. The base to which the refinance charge shall be applied shall be computed according to the following formula:

$$B = (P) - (F + I + A)$$

B = the base to which the refinance charge shall be applied.

P = the instalment sale price.

F = the finance charge allocable as in Section 12(d) to the part of the instalment sale price refinanced.

I = the insurance charges allocable as in Section 6(d) to the part of the instalment sale price refinanced.

A = amounts the instalment buyer has already paid under the agreement.

(b) An agreement between the instalment buyer and holder extending the time for payment of amounts unpaid by the instalment buyer under a retail instalment sales agreement shall be subject to the provisions and penalties of this Act. The holder may charge the instalment buyer a fee equal to ____% of the original sale price for the privilege of extending payments under the agreement, such fee to be paid by the instalment buyer at the time the holder grants the extension.

COMMENT

Refinancing, which includes renewals, usually occurs where the instalment buyer has either originally overestimated his ability to pay instalments of a certain amount or where some subsequent event has occurred making payment of these instalments economically impossible. Although it is arguable that refinancing is in the holder's best interest, the draftsmen recognize that refinancing is preferable to repossession and recommend that, as an incentive or reward of sorts to the holder who refinances, an interest rate of one or two percent higher than that set in Section 4 be allowed.

An extension does not presuppose as drastic a reappraisal of the instalment buyer's ability to pay as does refinancing. The line between the two occasionally becomes blurred but the essential difference is that while refinancing involves setting up different instalment amounts to run a longer period, extension involves only allowing the instalment buyer more time for making payment or payments. A fee for each payment extended is allowed.

SECTION 10. STATEMENTS

(a) Within the sixth month after the execution of the retail instalment sales agreement and within every sixth month thereafter until the instalment buyer has discharged all his obligations under the agreement, the

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holder shall send to the instalment buyer without request a statement of account which shall list the following designated as such:

(1) The total dollar amount paid by the instalment buyer, including downpayments and delinquency charges, to the date of the statement of account.

(2) Instalment payments due but not paid, if any, and any delinquency charges assessed thereon.

(3) The number of instalment payments and the dollar amount of each not due but still to be paid and the remaining period the agreement is to run.

(4) The finance charges paid, if any, during the prior calendar year and the finance charges to be paid during the current calendar year.

(b) Violations of this Section shall subject the holder to a penalty to the instalment buyer equal to the highest finance charge for one instalment period.

COMMENT

The purpose of this Section is to enable the instalment buyer to make an informed judgment as to the possibility of his prepaying or perhaps his requesting an extension or refinancing of his payments. Subsection (4) is inserted for personal income tax deduction purposes.

SECTION 11. DELINQUENCY CHARGES

Where the instalment buyer is in default by reason of nonpayment of an instalment and has continued in default for five days, the holder may charge and collect from the instalment buyer a single delinquency charge of not more than five percent of the amount of the overdue instalment, but such delinquency charge shall not be imposed the first time the instalment buyer is in such default unless the instalment buyer fails to pay the amount by or on the tenth day after the instalment was due.

COMMENT

This Section is similar to provisions contained in existing retail instalment sales acts with two exceptions, i.e., the period of grace allowed is somewhat shorter than usual and a different grace period is set up for the first time the instalment buyer fails to pay an instalment on time. By implication this Section prohibits delinquency charges for all other defaults including "substantial" defaults.

SECTION 12. DEFAULT, REPOSSESSION, AND REDEMPTION

(a) After an instalment buyer has been in default for ten days by reason of non-payment of an instalment, the holder shall be entitled to repossess the collateral, if any, securing the instalment buyer's obligations under the retail instalment sales agreement. When the holder is so entitled to repossess and if he decides to do so he must notify the instalment buyer by registered or certified mail of an "intent to repossess" the collateral and may repossess on or after the tenth day from the receipt by the instalment buyer of the notice of "intent to repossess." If, however, the instalment

buyer pays charges assessed to him within eight days from the receipt by him of the holder's notice of "intent to repossess," the holder's right to so repossess shall terminate. The holder's notice of "intent to repossess" to the instalment buyer shall apprise him of his aforementioned right to pay and prevent repossession.

(b) Where an instalment buyer is in default for other than nonpayment of an instalment, the holder shall not repossess until he has secured a court order allowing him to do so. A court shall not issue an order allowing a holder to repossess for such a default unless it finds that the instalment buyer's default has been substantial.

(c) No default by the instalment buyer shall entitle the holder prior to repossession to accelerate payments to be made by the instalment buyer.

(d) Within sixty days after repossession by the holder and before the collateral has been disposed of or a contract for its disposition has been made in good faith, the instalment buyer may redeem the collateral by payment of all the unpaid instalments, delinquency charges, and any reasonable expenses incurred by the holder in repossessing, holding, and preparing the collateral for the disposition or resale, but less the insurance premiums allocable to instalments not due at the time of repossession, as determined in Section 6(d), and the finance charges allocable to instalments not due at the time of repossession.

(e) Where collateral securing the instalment buyer's obligations under the agreement has been repossessed by the holder but not redeemed by the instalment buyer, the holder must sell or dispose of the collateral in a commercially reasonable manner within sixty days from the date of repossession or forfeit any claim for a deficiency assessment against the instalment buyer and the holder shall refund to the instalment buyer, without request, any excess of the fair market value of the collateral determined as of the date of repossession over the instalment sale price to be paid.

(f) After default and repossession of the collateral and subject to subsections (d) and (e) of this Section, the holder may sell or otherwise dispose of the collateral, such sale or disposition to be carried out in a commercially reasonable manner. The proceeds of any disposition shall be applied in the following order:

(1) Reasonable expenses of the disposition.

(2) Reasonable expenses of repossession, holding, and preparation of the collateral for disposition including reasonable attorney's fees where the attorney is not employed regularly by the holder.

(3) Satisfaction of the unpaid instalment sale price and delinquency charges less finance charges and insurance premiums allocable to instalments due after repossession as determined in subsection (d) of this Section.

(4) Surplus, if any, to the instalment buyer without request.

(g) No court shall enter a deficiency judgment against an instalment buyer which includes the finance charge and insurance premiums allocable

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to instalments due after repossession as determined in subsection (d) of this Section.

(h) (1) Repossession without complying with subsections (a) and (b) of this Section shall subject the holder to a penalty to the instalment buyer of an amount equal to fifty percent of the fair market value of the collateral at time of repossession and in addition the instalment buyer may sue the holder for conversion of the collateral.

(2) Failure of the holder to comply with Section 12(d) above shall subject the holder to liability for conversion.

(3) A violation of Section 12(f) shall subject the holder to a penalty to the instalment buyer of five hundred dollars.

COMMENT

The holder's remedy of repossession is rather drastic and has too often been attended with abuses. Strict regulation is necessary and to this end this Section was drafted.

Subsection (a) sets out the conditions precedent that must be met and the steps the holder must take before he may repossess. It is obvious that "redemption" prior to repossession is encouraged. A problem may arise, however, where the instalment buyer has been continually late in making payments or has been in default for a number of instalments and the holder has neglected to notify the buyer of an "intent to repossess." A sudden assertion of his rights under subsection (a) by the holder should not create an estoppel situation although the buyer would be perhaps hard pressed to pay the instalments then due and prevent repossession. Courts deciding that an estoppel existed where the holder had "sat on his rights" were interpreting a statute which did not contain an eight day grace period.

A definition and listing of "substantial" defaults could not possibly be all-inclusive. Thus, whether a default for other than nonpayment of an instalment is or is not "substantial" should be a question of fact. The draftsmen recommend that "Consumer Courts" be established in the various states to adjudicate this and other questions of fact posed in this Act. Unlike subsection (a), subsection (b) makes no provision for "redemption" before repossession but leaves open possible adjustments (unlikely since the holder has gone to the trouble of securing a court order) between the parties.

Subsection (c) prohibits acceleration by the holder of instalment payments in any case of default prior to repossession and is contra to UCC section 3-109 which broadly validates acceleration clauses. Acceleration is, of course, available to the buyer by virtue of Section 6(d).

Subsection (d) in effect permits acceleration by the holder after repossession. Unlike Section 6(d), there must be strict allocation of finance and insurance charges accruing to instalments not due at the time of repossession. The instalment buyer has sixty days after repossession to redeem unless the holder disposes of the collateral before that time.

Subsection (e) modifies UCC section 9-505 to conform to the scheme of this Act. This subsection does not require the holder to dispose of the collateral repossessed but if he keeps such collateral as his own (and it is assumed the holder has so retained the collateral if he has not sold or disposed of it within

sixty days after repossession) he forfeits any deficiency claim against the instalment buyer. Where the holder so retains the collateral and its fair market value at repossession is more than the amount of the instalment sale price the instalment buyer is to pay, the holder must refund the excess to the instalment buyer. This is to provide for the case where it would be to the advantage of the holder to retain repossessed collateral and fall outside the operation of subsection (f)(4).

The provisions in subsection (f), with the exception of provision (4), integrate existing law in this area. The draftsmen urge that the test contained in UCC section 9-507(2) as to when a sale or disposition is made in a "commercially reasonable manner" be utilized. Subsection (g) is inserted to obviate the holding of *Pacific Discount Co. v. Powell*, 174 A.2d 440 (Md. 1961).

SECTION 13. SEPARATE NOTES

If, as part of any instalment sales transaction, a note is taken evidencing the instalment buyer's obligations under a retail instalment sales agreement, such note shall refer to the retail instalment sales transaction out of which it arose and any holder of such note shall be subject to all defenses which the instalment buyer may assert against the instalment seller. Provisions in the note excluding or modifying warranties made by the instalment seller in connection with the retail instalment sale to the instalment buyer and provisions in the note inconsistent with the provisions of this Act shall be unenforceable.

COMMENT

This Section does not destroy the negotiability of notes executed by an instalment buyer in connection with a retail instalment sales agreement and applies either where the instalment seller assigns the note to a holder or where the instalment buyer executes a note directly to a holder as part of the sales transaction. The holder of such a note in effect cannot be a holder in due course.

SECTION 14. REVOLVING CREDIT AGREEMENTS

(a) Any agreement creating a revolving credit account shall be subject to all the provisions and penalties of this Act except the phrase "a description of the goods or services purchased" in Section 2(b), Sections 2(c), 4, and 6, the first sentence in Section 8(c), and Section 10.

(b) The instalment seller may assess a finance charge upon the instalment buyer which shall not exceed ___% per month computed upon the outstanding unpaid balance at the end of the monthly period.

(c) The instalment seller under this Section shall furnish the instalment buyer a monthly statement of account which shall include:

- (1) The outstanding unpaid balance at the end of the current monthly period.
- (2) The finance charge thereon in both dollars and percent.
- (3) The amount of payments made during this period.
- (4) A description and the cash price of goods purchased during the current period.
- (5) An enumeration of any other charges.

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COMMENT

The purpose of this Section is to include within most of the provisions of this Act the various "credit for purchases" devices used by commercial establishments alone or in conjunction with lending institutions. Under subsection (b) a method different than that required by Section 4 is devised to compute the allowable interest rate. The true annual interest formula of Section 4 would be unwieldy in the typical revolving credit situation.

SECTION 15. ADVERTISING

(a) No instalment seller shall in any advertisement, publication, solicitation, or representation, make any misleading statements in relation to a finance charge. Any advertisement, publication, solicitation, or representation, in relation to a percentage finance charge is presumed to be misleading if expressed otherwise than in terms of true annual interest as defined in Section 4.

(b) A violation of this Section shall be presumptively wilful.

COMMENT

Section 15 does not prohibit the advertising of the dollar cost of finance charges but does apply to the advertisement of revolving account credit percentage rates. This Section, however, leaves to other regulatory legislation the advertising of interest rates by finance companies and banks.

SECTION 16. VIOLATIONS AND PENALTIES

Any instalment seller or holder who wilfully violates any Section of this Act shall be guilty of a misdemeanor and shall be liable to a fine of not less than \$100 and not more than \$500 for each offense.

COMMENT

A violation of any provision of this Act subjects the offender to criminal liability and fine. It is incumbent upon state authorities to prosecute such offenders to further the protection of the consumer, especially where a violation of Section 15 is involved.

SECTION 17. WAIVER

(a) Any waiver of any provisions of this Act by the instalment buyer shall be unenforceable.

(b) Any provision in any retail instalment sales agreement or in any note executed in connection with such an agreement that conflicts with any Section of this Act shall be unenforceable.

COMMENT

Subsection (a) refers to waivers contained in both the retail instalment sales agreement and a note executed by the instalment buyer evidencing his obligations under the agreement. A retail instalment sales agreement or a note executed in connection with such an agreement containing unenforceable terms shall be enforced as far as possible and consistent with the provisions of this Act.

SECTION 18. HOLDER

Any holder of a retail instalment sales agreement, or of a note evidencing indebtedness arising out of such agreement, shall be subject to the provisions of this Act.

SECTION 19. SEVERABILITY

If any section or part thereof of this Act shall be declared invalid, such invalidity shall not affect the remainder of this Act.

SELECTED REFERENCES

The amount of literature focusing on the instalment sale transaction has become rather voluminous in the last decade and to attempt a typical bibliography would be usurping the function of the *Index to Legal Periodicals*. Such proliferation of source material is attributable to the increased use of the instalment sale device by consumers, the outcry directed against abuses surrounding it, and the often sketchy efforts at regulation by the states. The most progressive legislation in this area seems to be that adopted by Maryland. The New York and California acts are also noteworthy although defective in some respects as pointed out in Willier, *Protection Installment Buyers Didn't Get*, 2 B.C. Ind. and Com. L. Rev. 287 (1961).

In the law review area, Professor Hogan of Cornell Law School in two comparatively recent articles has, so to speak, covered the field—*Retail Installment Sales Legislation*, 58 Colum. L. Rev. 854 (1958), and *A Survey of State Retail Installment Sales Legislation*, 44 Cornell L.Q. 38 (1958). Also deserving of mention are Warren, *Regulation of Finance Charges in Retail Installment Sales*, 68 Yale L.J. 839 (1959), and the *Consumer Credit Symposium: Developments in the Law*, 55 Nw. U.L. Rev. 301 (1960).

The abuses prevalent in the instalment sales area, as traced for the layman in Black, *Buy Now, Pay Later*, New York: William Morrow and Company, 1961, are by no means confined to the United States. In 650 H.C. Deb. 1716-1809 (1961), the history of instalment sales in Great Britain is discussed in connection with a proposed amendment to the British Hire-Purchase Act. The fancied sedate English temperament was not in evidence when the pros and cons of the somewhat novel proposals of W. T. Williams, M.P., were discussed. The draftsmen of this Model Act welcome any unsettling of American temperaments in the hope that in the not too distant future an article entitled, *The Excellent Protection Installment Buyers Are Getting*, will be written.